

Bills Committee on Broadcasting (Amendment) Bill 2003

Summary of deputations' views on major proposals and the Administration's response

Issue	Organization/ Individual	Concerns/Views	Administration's Response
1. Criminal sanction against fraudulent reception of subscription television programmes by domestic viewers	Consumer Council	<ul style="list-style-type: none"> ◆ Agrees that criminal liability should not be imposed for end-users of domestic pirated viewing because: <ul style="list-style-type: none"> (a) it may not be easy to attribute liability to the person culpable out of a whole family that is watching a subscription service, i.e. whether the acquirer, the owner of the premises or the viewer should be liable; (b) the reception device may be acquired from a door-to-door promoter and the acquirer may be unaware of the illicit nature of the device; and (c) the device might be unwittingly taken over from a previous occupier of premises. ◆ The Government should reconsider whether the level of protection that exists for consumers against deceptive, misleading and unfair practices by 	<ul style="list-style-type: none"> • We welcome Consumer Council's support of our approach. We note the Council's suggestion on protection of consumers.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		businesses is adequate when it reviews the need to impose end-user criminal liability after the service providers have employed digital transmission and advanced encryption technology.	
	The Chinese General Chamber of Commerce	<ul style="list-style-type: none"> ◆ Support the spirit of the Government's legislative proposal to tighten control of pirated viewing. 	<ul style="list-style-type: none"> • We welcome the Chamber's support of our approach.
	Joint letter by ATV, TVB, Galaxy, HKCTV, TV Plus and Yes TV	<ul style="list-style-type: none"> ◆ Urge for the introduction of both criminal sanction and civil remedy against unauthorized reception of subscription television programme by both commercial and domestic end-users. ◆ Consider that unauthorized reception of subscription television services is by nature a misdemeanour of theft or dishonest appropriation of property, whether committed at commercial or domestic premises. ◆ As early as 1993, the Law Reform Commission of Hong Kong specifically recommended criminalizing fraudulent reception of subscription television 	<ul style="list-style-type: none"> • We do not condone pirated viewing. The existing section 6 of the Broadcasting Ordinance (BO) (Cap 562) imposes criminal sanctions against commercial manufacture, distribution and marketing of unauthorized decoders. • We consulted the public on whether we should expand the scope of criminal sanction to cover end-users. On criminalizing domestic pirated viewing, the views of the public are diverse. However, the public in general support criminalizing pirated viewing for commercial purposes. • After considering the industry's interests, the outcome of public consultation and the adequacy of digitization and encryption and conditional access technology to

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>programmes.</p> <ul style="list-style-type: none"> ◆ Enforcement difficulties and privacy concerns are not excuses to exonerate domestic pirated viewing. Given that law enforcement officers are given the power to search for stolen goods at domestic premises under the Theft Ordinance (Cap. 210) etc, there is no justification why the same power cannot be applied to investigate into signal theft at domestic premises. ◆ Signal thefts by domestic end-users need to be sanctioned instantly and forcefully to protect the property rights of the television operators, the interests of the lawful subscribers and revenues of the Government, as in other developed economies including the United States, United Kingdom, France and Canada. 	<p>prevent pirated viewing, we propose a gradual, balanced approach to tighten the control of pirated viewing. We believe that the Government's approach is more acceptable to the public.</p> <ul style="list-style-type: none"> • Our approach is in line with international practice. The majority of Member States of the European Union and Australia do not impose criminal sanction against private pirated viewing. • We note that some jurisdictions impose criminal sanction against domestic pirated viewing. However, to the best of our knowledge, there has been no active enforcement of the laws in these jurisdictions. Enforcement action targets upstream dealer level.
	Hong Kong Cable Television Limited	<ul style="list-style-type: none"> ◆ Domestic pirated viewing cannot be contained without criminal sanction. ◆ The illicit supply of unauthorized decoders will continue unless the demand for them by end-users is 	<ul style="list-style-type: none"> • See response to TV broadcasters' joint letter above.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>effectively stopped by criminal sanction.</p> <ul style="list-style-type: none"> ◆ There are at least 100 000 unauthorized decoders (compared to the authorized number of around 560 000) in use for reception of Cable TV's programmes and accounted for an estimated annual loss in the company's revenue of about HK\$390 million. Revenues of the content providers and the Government are also greatly affected. ◆ Implementation of criminal law for domestic end-users is not intrusive if the power to enter domestic premises is granted by the court in the form of a warrant for law enforcement purposes. According to the legal opinion of Mr John Griffiths (see Appendix II of Cable TV's submission), legislation which imposes criminal sanction against domestic pirated viewing, if introduced proper safeguards, would not infringe or breach the right to privacy. Law-enforcers should find ways to overcome the enforcement difficulty, if any, to protect the legal rights of pay-TV operators. 	

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<ul style="list-style-type: none"> ◆ It is difficult to take out civil action because of the large number of unauthorized end-users and its deterrent effect is limited because the users may just need to pay the outstanding subscription fees. 	
	Motion Picture Association	<ul style="list-style-type: none"> ◆ Support to revisit the issue of criminalizing domestic pirated viewing after assessing the impact of digitization of television programme services. 	<ul style="list-style-type: none"> • We welcome the Association's support of our approach.
	Hong Kong Kowloon and New Territories Motion Picture Industry Association	<ul style="list-style-type: none"> ◆ For the local film industry, the pay-TV platform is one of the most important distribution windows that can contribute a significant portion of distribution income to the film industry. ◆ Urge the introduction of both criminal sanction and civil remedy against pirated viewing. 	<ul style="list-style-type: none"> • See response to TV broadcasters' joint letter above.
	Nagravision SA Television Broadcasts Limited	<ul style="list-style-type: none"> ◆ Worldwide experience shows that encryption technology alone cannot solve the problem. Criminalisation is necessary to achieve the deterrent effect. 	<ul style="list-style-type: none"> • See response to TV broadcasters' joint letter above.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
	The Chinese Chamber of Commerce	<ul style="list-style-type: none"> ◆ The television programme service providers should improve encryption technology rendering unauthorized decoding impossible. 	
2. Statutory definition of unauthorized decoders (proposed section 2(1) - Interpretation)	Motion Picture Association	<ul style="list-style-type: none"> ◆ Express concern about the annual losses to cable television operators in Hong Kong from the estimated 70 000 unauthorized subscribers of television programmes amounting to almost US\$28 million, according to CASBAA. 	
	Motion Picture Association Cable and Satellite Broadcasting Association of Asia (CASBAA)	<ul style="list-style-type: none"> ◆ A person may import into Hong Kong for commercial purposes decoders lawfully manufactured to facilitate the reception of encrypted signals in overseas territories for unauthorized reception in Hong Kong of signals broadcast by the Asia-Pacific pay-TV operators authorized by MPA member companies/CASBAA members. As these overseas pay-TV operators are not licensed operators providing subscription television programme services in Hong Kong, it would appear that the unauthorized decoders for viewing their programmes would fall outside the proposed scope of "unauthorized decoder" as defined 	<ul style="list-style-type: none"> • It is the Government's conscious decision not to include the decoding devices referred to by the Motion Picture Association and CASBAA. • As pointed out in Motion Picture Association's submission, some decoders for receiving foreign satellite pay TV service obtained through legitimate subscriptions in other territories outside of Hong Kong are imported and sold to customers on basis of a one-time payment. This is often called the satellite TV grey market which occurs in Europe and North America as well. The end-user has not used a device to circumvent the encryption and conditional access technology to avoid

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>under the Bill. This loophole should be plugged.</p>	<p>payment.</p> <ul style="list-style-type: none"> • The existing section 7 of the BO imposes criminal offence on dealers of these grey market satellite TV decoding devices. • We do not consider that sanction against users of these decoding devices is justified as the user is not avoiding the payment for a service. • If a person uses the decoding device to receive and show TV programmes in a commercial premises (e.g. in a pub) without licence of the copyright owner, the user may infringe the copyright of the copyright owner under section 27(3) of the Copyright Ordinance. The infringer is liable to the civil action brought by the copyright owner.
	<p>Hong Kong Cable Television Limited</p>	<ul style="list-style-type: none"> • A legitimate decoder obtained through domestic subscription used in commercial premises should be included in the definition of “unauthorized decoder”. 	<ul style="list-style-type: none"> • “Unauthorized decoder” as defined in the Bill is meant to catch the device that circumvents protective measures to avoid payment of a subscription fee. We do not consider HKCTV’s suggested amendment appropriate. • The restrictions on the use of a legitimate

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<ul style="list-style-type: none"> ♦ The following acts at the supply level should also be prohibited by law: <ul style="list-style-type: none"> - repairing, installing, modifying an authorized decoder; - promoting the use of an unauthorized decoder and publishing information with the intention of assisting or enabling any person to use an unauthorized decoder. 	<p>decoder obtained through subscription is a contractual arrangement between the service provider and customers. A breach of the service contract is a commercial matter to be resolved between the contracting parties.</p> <ul style="list-style-type: none"> • The policy objective behind the Bill is to prohibit commercial activities in relation to the manufacture, supply, and possession and use of unauthorized decoders for commercial purposes. The existing provision in the BO to prohibit “offered for sale” of unauthorized decoders already achieves the effect of prohibiting the marketing of unauthorized decoders.
3. Unauthorized decoders (proposed section 6)	Hong Kong Bar Association	<ul style="list-style-type: none"> ♦ Considers that proposed section 6(1)(b) is an extensive expansion of criminal liability. The proposed amendments are in similar terms with the amendments to the Copyright Ordinance (Cap 528) contained in the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (IP(MA)O) which were met with enormous community outcry and had to be suspended shortly afterwards by the 	<ul style="list-style-type: none"> • We are aware that one of the legislative proposals under the Copyright (Amendment) Bill 2003 is to impose criminal sanction against copyright infringing act concerning four categories of works for the purpose of trade or business. It is proposed that the wording “in connection with” should be deleted from the expression “for the purpose of, in the course of, or in connection with, any trade or business” where it appears in the

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>enactment of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap 568). The Copyright (Amendment) Bill 2003 now under scrutiny has proposed, after a review of IP(MA)O, to omit the expression "in connection with, trade or business" as part of the criminal offence of possession of an infringing copy of certain categories of copyright work. It also provides a definition for the expression "doing any act for the purpose of or in the course of trade or business".</p> <ul style="list-style-type: none"> ◆ Proposed section 6(1)(b), which allows the prosecution to show only an act "in connection with, trade or business", appears to punish the presence or use of unauthorized decoders whenever and wherever there is any slightest association between such presence or use with a trade or business of a person and is arguably broader than what is 	<p>Copyright Ordinance. This is a conscious decision to reduce the scope of criminal liability. For the Broadcasting (Amendment) Bill, the wrongdoing in question is the use of an unauthorized decoder to avoid payment of a subscription in commercial premises. The continuous use of the decoder will bring recurrent loss of legitimate subscription revenue to the licensed pay TV service provider, no matter the usage is in direct course of business or in connection with the business. We therefore suggest that the act committed in commercial premises in both circumstances should be sanctioned. Hence, we propose retaining "in connection with" in the Broadcasting (Amendment) Bill 2003 to achieve a deterrent effect.</p> <ul style="list-style-type: none"> • The proposed section 6(1)(b) restricts the possession or use of unauthorized decoders <u>for the purpose of, or in connection with, a trade or business</u>. The situations pointed out in the Bar Association's submission, for example, the mere presence of an unauthorized decoder left behind by a consumer inadvertently in commercial premises, will not lead to a prosecution

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>needed to deal with unauthorized reception of subscription television programme services for commercial purposes. The proposed provision seems to be casting the net of criminal liability too wide and the Bills Committee is recommended to examine the scope of the proposed section 6(1)(b) with a view to tightening its scope.</p>	<p>against the innocent operator.</p>
<p>4. Introduction of presumptions (clauses 3(b) and 4)</p>	<p>Hong Kong Bar Association</p>	<ul style="list-style-type: none"> ◆ Considers that the Administration has not provided justification for the introduction of the presumptions in clauses 3(b) and 4 for offences under proposed section 6 and existing section 7 and urges that the presumptions be scrutinized with great care: <ul style="list-style-type: none"> (a) In a prosecution for an offence in respect of an unauthorized decoder found in commercial premises under proposed section 6(1)(b), the prosecutor needs only to produce evidence satisfying the criminal standard of proof of an unauthorized decoder having been found in such premises to trigger the presumption of possession against the licensee, tenant, lessee, 	<ul style="list-style-type: none"> • We are aware that the offences under the proposed section 6(1) are strict liability offences. This, coupled with the presumptions, are necessary for effective enforcement of the provisions. On the other hand, the Bill has also provided adequate defences to protect the defendant. • The provisions pointed out by the Bar Association will not contravene the principle of presumption of innocence. Detailed legal analysis is provided at Annex.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>occupier, person in charge or the owner of the premises. Evidence that the possession of the unauthorized decoder was for the purpose of, or in connection with, trade or business would trigger the presumption of knowledge on the part of the person in charge that the decoder was an unauthorized one. The person in charge would have to rebut those presumptions by putting forward evidence to the contrary.</p> <p>(b) Likewise, if the person found guilty of an offence under proposed section 6(1)(b) is an employee, the employer (or the directors/partner in case the employer happens to be a company or a body corporate/ a partnership) is presumed to be guilty of the like offence unless he provides evidence to the contrary that he has discharged the defence under proposed section 6(7)(a) and (b), or that he has not authorized the act to be done.</p> <ul style="list-style-type: none"> ◆ The operation of the proposed presumptions in clauses 3(b) and 4 may have the effect of converting criminal 	

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>offences that require the proof of knowledge (and hence mens rea) into, in effect, strict liability offences, especially in the case of directors, partners and employers. The presumptions once triggered reverse the burden of proof into the hands of the accused. Such presumptions are prima facie inconsistent with presumption of innocence guaranteed under Art 87 of the Basic Law and Art 14(2) of the International Covenant on Civil and Political Rights.</p>	
<p>5. Offence of providing decoders and reception equipment for television programme service on subscription basis without licence (proposed sections 7(3A) to 7(3G))</p>	<p>CASBAA</p>	<ul style="list-style-type: none"> ◆ As the subscriptions payable for distributors re-transmitting CASBAA members' channels to Thailand, Malaysia and the Philippines do not give the right to view any of such television programme service in Hong Kong, existing section 7(1) of the BO, which specifies that a decoder shall not be used to receive a broadcasting service which is not licensed on a subscription basis may not apply in the light of the definition of "subscription" under the BO. ◆ Under section 2 of BO, "subscription" 	<ul style="list-style-type: none"> • CASBAA may have misinterpreted section 7(1). The section prohibits the import, export, manufacture, sale, offer for sale or let for hire, in the course of trade or business, of “any decoder for use by a Television Receive Only (TVRO) system to receive a broadcasting service which is not licensed on a subscription basis”. This catches all decoders for reception of foreign satellite pay TV services not licensed in Hong Kong via TVROs.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		<p>means a fee payable by or on behalf of any person for the right to view a television programme service in Hong Kong. CASBAA suggests to add the words "or elsewhere" after "Hong Kong" to plug the aforesaid loophole.</p> <ul style="list-style-type: none"> ◆ Suggests to add a subsection to existing section 7(1) of BO to provide that subject to section 7(2), a person shall not for the purpose of, or in connection with, trade or business, possess or use, or authorize another person to possess or use, any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis. 	
6. Enforcement-related issues (proposed section 7A)	The Chinese General Chamber of Commerce	<ul style="list-style-type: none"> ◆ The Administration should strengthen its cooperation with the Mainland authority in combating the manufacture and sale of illegal decoders so as to reduce or prevent the incidence of unauthorized reception of subscription television programme services. ◆ Government should be cautious about any enforcement action that could be intrusive. 	<ul style="list-style-type: none"> • Noted and will forward the suggestion to the enforcement agents for consideration.

Issue	Organization/ Individual	Concerns/Views	Administration's Response
	Motion Picture Association	<ul style="list-style-type: none"> Agrees that the Telecommunications Authority (TA) should be further empowered to rationalize the enforcement of the provisions against decoder-related offences. It also notes that the Police and the Customs and Excise Department have already agreed to cooperate during enforcement actions conducted by TA. 	<ul style="list-style-type: none"> Noted.
	Hong Kong Bar Association	<ul style="list-style-type: none"> Notes the introduction of a new power of arrest in proposed section 7A(1)(b) and the new criminal offence of obstruction of duty in proposed section 7A(6). 	<ul style="list-style-type: none"> The arrest power, which facilitates OFTA in enforcement actions, is modeled on a similar power under section 35(1)(a) of the Telecommunications Ordinance. Past experience shows that, without the power, OFTA can only rely upon Police to arrest suspects. This means that OFTA could not carry out enforcement actions on its own. This has hampered our enforcement actions in the past since the Police is burdened with other duties of higher priority.
7. Civil remedy (proposed section 7B)	Motion Picture Association	<ul style="list-style-type: none"> Under the Bill, only a licensee sustaining loss or damage from a breach of proposed section 6(1)(a) or (b) may seek civil remedy. Motion Picture Association suggests that 	<ul style="list-style-type: none"> It is appropriate to accord licensees only the right to seek civil remedy. We are aware that in the relevant provisions of the Australian Copyright Amendment (Digital Agenda) Act 2000, only licensed

Issue	Organization/ Individual	Concerns/Views	Administration's Response
		television programme service providers should also be allowed to pursue civil remedy against signal theft.	broadcasters may bring civil action.
	CASBAA	<ul style="list-style-type: none"> ◆ Suggests that the scope of persons who can bring an action for civil remedy should include any persons providing a television program service who can show that they have suffered loss or damage as a result of the breach by the infringer. 	<ul style="list-style-type: none"> • It is appropriate to accord licensees only the right to seek civil remedy. We are aware that in the relevant provisions of the Australian Copyright Amendment (Digital Agenda) Act 2000, only licensed broadcasters may bring civil action.
	Hong Kong Bar Association	<ul style="list-style-type: none"> ◆ Points out that this provision does not specify a time limit for bringing an action for civil remedies, unlike section 15(2) of BO which does for the civil remedy on competition matters. It may also be useful to explore the rationale for extending civil remedy to those not covered in the criminal offences in proposed section 6. 	<ul style="list-style-type: none"> • Although we do not propose a time limit for bringing a civil action, we are aware that in a similar provision under the Australian Copyright Amendment (Digital Agenda) Act 2000, a civil action cannot be brought against a person after the expiration of 6 years from the time when the person did the act. We are prepared to consider suggestions on imposing a time limit.

Serial No. of submissions:

Consumer Council (LC Paper No. CB(1) 2334/02-03(01))

Joint submission (LC Paper No. CB(1) 2334/02-03(01)) from:

- Asia Television Limited
- Galaxy Satellite Broadcasting Limited
- Hong Kong Cable Television Limited
- Television Broadcasts Limited
- TV Plus (HK) Corporation Limited
- Yes Television (Hong Kong) Limited

Cable and Satellite Broadcasting Association of Asia Limited (LC Paper No. CB(1) 2381/02-03(01))

The Chinese General Chamber of Commerce (LC Paper No. CB(1) 2381/02-03(02))

Motion Picture Association (LC Paper No. CB(1) 2381/02-03(03))

Hong Kong Bar Association (LC Paper No. CB(1) 2381/02-03(04))

Hong Kong Kowloon and New Territories Motion Picture Industry Association Ltd.

(LC Paper No. CB(1)2426/02-03(01))

Nagravision SA (LC Paper No. CB(1)2445/02-03(03))

Television Broadcasts Limited (LC Paper No. CB(1)2531/02-03(01))

Legislative Council Secretariat

Commerce, Industry and Technology Bureau

30 September 2003

Hong Kong Bar Association's Comments on Broadcasting (Amendment) Bill 2003 (the Bill)

The Administration's response to Hong Kong Bar Association's comments on the Bill are set out below.

Bar Association's comments

2. The Bar Association questioned whether the presumptions and defences in clauses 3 (b) and (4) of the Bill are compatible with Article 87 of the Basic Law (BL) and Article 14(2) of the International Convention on Civil and Political Rights (ICCPR), by reference to case law, including *A-G of Hong Kong v Lee Kwong-kut*¹ and *R v Lambert*². In particular, the Bar Association was concerned about the presumption contained in the proposed s. 6(b) and s. 6(5) of the Bill. According to the Bar Association, "[t]he person in charge would have to rebut those presumptions by putting forward evidence to the contrary to the standard of proof of on balance of probabilities."³ The Bar may need to appreciate the real effect of the statutory language of the proposed sections and the opinion of their Lordships in *Lambert*. In light of *Lee Kwong-Kut*, *Edwards*⁴ and *Lambert*, our view is that the proposed sections are not inconsistent with Article 87 of the BL and Article 14(2) of the ICCPR.

The presumption of innocence

3. The presumption of innocence is frequently referred to as the golden thread of the criminal law. The right to be presumed innocent is protected by both Article 14(2) of the ICCPR and Article 11(1) of the Hong Kong Bill of Rights (HKBOR), the latter has incorporated the former in our domestic law and provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption is also recognised in BL87(2) which reads as follows:

"Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organ without delay and shall be presumed innocent until convicted by the judicial organs."

4. However it is equally well established in case law that the presumption of innocence is never absolute. The starting point of the ambit of this presumption can perhaps be taken from the cardinal case of *Woolmington v*

¹ [1993] AC 951.

² [2001] 1 3 WLR 206.

³ See para. 11 of the Bar Association's comments.

⁴ *R v Edwards* [1975] QB 27.

*Director of Public Prosecutions*⁵. There Viscount Sankey LC stated that:

“Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the person’s guilt subject...also to any statutory exception.”

5. The statement contains a powerful declaration of one most celebrated principle of English criminal law. But of equal note is the recognition of the possibility of statutory exceptions. This point was clarified by Lord Reid in *Sweet v Parsley*⁶. According to his Lordship:

“...there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method: but one of the bad effects of the decision of this House in *Woolmington v DPP* [1935] AC 462 may have been to discourage its use.”

6. The ambit of the presumption received further discussion in *R v Edwards*. There the Court of Appeal concluded that there was an exception to the fundamental rule of criminal law that the prosecution must prove every element of the offence charged. Having examined a line of authority dating from the 17th century, Lawton LJ said that⁷:

“...this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal offence that the prosecution must prove every element of the offence charged. This exception ... is limited to the offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.”

⁵ [1935] AC 462, at 481.

⁶ [1970] AC 132, at 149-150.

⁷ See Note 4 above, at 39-40.

7. The above passage was quoted with approval by the Privy Council in *Lee Kwong-kut*⁸ and was discussed more recently by the Court of Appeal in *Slinery v London Borough of Havering*⁹. In this case, the defendant was charged with an offence under the Trade Marks Act 1994, s. 92(1). Section 92(5) of the Act provides that “it is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use ...was not an infringement of the ...trademark.” Giving the judgment of the court, Lord Justice Rose said¹⁰:

“In our judgment, having regard to the authorities and, indeed, to the general principle, as a matter of English law it is open to Parliament to provide that, in criminal proceedings in a given context, a legal (persuasive) burden be imposed upon an accused; but, if, that is to be so, that is to be regarded as an exceptional course and sufficiently clear language is required. Ultimately, however, all depends on the interpretation of the particular statutory provision in question.”

Despite the fact that a defendant convicted under s. 92(1) may face up to 10 years imprisonment, the court concluded that the imposition of a legal burden on the defendant did not infringe the right to be presumed innocent under Article 6(2) of the European Convention on Human Rights (Convention).

Legal verses evidential burden

8. In *Lambert*, the House of Lords distinguished a legal/persuasive burden from an evidential one. Whilst the imposition of a legal burden on the accused would likely be inconsistent with the presumption of innocence, the imposition of an evidential burden would not have similar effect. A legal burden of proof requires the defendant to prove, **on the balance of probabilities**, a matter which is essential to determine his guilt or innocence. An evidential burden, on the other hand, only requires the defendant to adduce sufficient evidence to raise an issue before it has to be determined as one of the facts of the case. The prosecution does not need to lead any evidence about it. But if it is put in issue, the burden of proof remains with the prosecution¹¹.

9. The classification of statutory presumptions is not an exact science. Lord Hope held that it might be useful to consider the following questions:

- (1) What does the prosecution have to prove in order to transfer the onus to the defence?
- (2) What is the burden on the defendant – does it relate to something which is likely to be difficult for him to prove, or does it relate to

⁸ See Note above, at 962.

⁹ [2002] EWCA Crim 2558.

¹⁰ *Ibid*, para. 17

¹¹ See Note 2 above, at 230-232..

something which is likely to be within his knowledge or to which he readily has access?

- (3) What is the nature of the threat faced by society which the provision is designed to combat?¹²

10. Lord Hope's approach received support from the Privy Council in *Brown v Procurator Fiscal*¹³. With the exception of the mandatory presumption of guilt, Lord Hope adopted a flexible approach to the other kinds of presumption. According to his lordship, **the Article 6(2) right "is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality"**¹⁴. (emphasis added)

Presumption of knowledge

11. Clause 3(a) creates a new s. 6(1)(b) which criminalizes the possession or use or authorising the possession or use, for the purpose of, or in connection with trade or business, an unauthorised decoder¹⁵. Where it is proved that a person has, for the purpose of, or in connection with, trade or business, possessed or used, or authorised another person to possess or use an unauthorised decoder, the proposed s. 6(3)(b) provides that "unless there is evidence to the contrary, it shall be presumed that the person knew that the decoder was an unauthorised decoder." Where a company/body corporate/partnership has done the prohibited act under s. 6(1), "unless there is evidence to the contrary", the director/partner would be presumed to have authorised the act.

12. The situation under s. 6(1)(b) and (3)(b) bears a close resemblance to the exceptions stipulated in *Edwards* discussed in paragraph 6 above. In Hong Kong, it is common knowledge that one has to pay the required subscription to the licence holder in order to watch pay television programmes. The licence holder, upon receipt of payment, would provide a decoder to enable the payee to watch the encrypted television programmes. A person would not be convicted under the proposed section unless his decoder is an unauthorised one, that is, "a decoder by means of which encrypted television programmes or encrypted television programs services provided under a licence can be viewed in decoded form without payment of a subscription where a subscription is required to be paid"¹⁶. In the circumstances, it is submitted that whether the defendant has paid the required subscription is a matter likely to be within the knowledge of the defendant or a matter which he has ready access. It is very unlikely that a defendant who is not possessing or

¹² *R v DPP ex parte Kebeline* [1999] 3 WLR 972, 1000.

¹³ 5th December 2000.

¹⁴ *Lambert*, see Note 2 above, at 237.

¹⁶ See the proposed definition of "unauthorised decoders" in clause 2 of the Bill.

using an unauthorised decoder would have any difficulty to rebut the presumption. In our view, the provision falls within the excepted situations stipulated in *Edwards*.

13. As far as the presumption under s. 6(4) is concerned, our view is that the use of an unauthorised decoder in business is most likely to benefit the proprietor. Without his instructions, it is unlikely that an employee would use an unauthorised decoder for the purpose of trade and business in the course of employment¹⁷. It is submitted that whether the decoder is an unauthorised one is within the peculiar knowledge of the proprietor. Since the policy intent of the section is to combat the possession or use of unauthorised decoders for commercial purpose, it would defeat the purpose of the Bill if traders are able to hide themselves behind the employees. The presumption appears to flow logically from the use of the unauthorised decoder in the business context. Further, as discussed below, it is unlikely that the burden imposed on the defendant would be considered as a legal one.

Presumption of possession

14. In proceedings under the proposed s. 6, it is further provided that “unless there is evidence to the contrary”, unauthorised decoders found on the premises are presumed to be in the possession of the licensee, tenant, lessee, occupier, person in charge and owner of the premises. The presumed fact of possession flows logically from the proved fact, the finding of unauthorised decoders on the premises. More importantly, the defendant can easily rebut the burden by adducing sufficient evidence to raise the defence. In his much celebrated article, *The Logic of “Exceptions”*, G. Williams raised the following question: Why should not the concluding words “unless the contrary is proved” be taken to mean “unless sufficient evidence is given to the contrary”? In the opinion of the learned author, if the latter phrase was employed, it would point to an evidential burden¹⁸. Relying on this statement of Williams, the House of Lords in *Kebilene* and *Lambert* even held that it is possible to read “to prove” as imposing merely an evidential burden. Lord Cooke of Thorndon said¹⁹:

“...for evidence that it is a possible meaning one could hardly ask for more than the opinion of Professor Glanville Williams in ‘The Logic of “Exceptions”’ [1988] CLJ 261, 265 that ‘unless the contrary is proved’ can be taken, in relation to a defence, to mean ‘unless sufficient evidence is given to the contrary;’ and the statute may then be satisfied by “evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence’.”

¹⁷ Of course if the employee is not possessing or using an unauthorised decoder in the course of employment, the employer would not be liable.

¹⁸ Williams, G., *The Logic of “Exceptions”*, *The Cambridge Law Journal*, 1988, 261, at 264-265.

¹⁹ *Kebilene* [2000]2 AC 326, 373.

This statement was quoted with approval by Lord Hope in Lambert²⁰.

15. In light of House of Lords' view as expressed in the two decisions, our view is that the natural and ordinary meaning of the phrase "unless there is evidence to the contrary" in clauses 3(b) and 4 only requires the defendant to adduce sufficient evidence to raise the defence. The onus remains with the prosecution to prove all aspects of the offence beyond reasonable doubt. As such, the contention that the clauses require the defendant to put "forward evidence to the contrary to the standard of proof of on balance of probabilities" should be rejected.

Conclusion

16. On the basis of the above discussion, our view is that the presumption and the defences contained in s. 6(3)(b), s. 6(4) and (5) are unlikely to infringe BL 87 and Article 11(1) of the HKBOR.

September 2003

²⁰ See Note 2 above, 235-236.